LIBRARY
SUPREME COURT, U. S.

FILED
JAN 29 1974
MICHAEL RODAK, JR., CLERK

No. 73-883

In the Supreme Court of the United States

OCTOBER TERM, 1973

FRANKLIN STEEL PRODUCTS, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-883

FRANKLIN STEEL PRODUCTS, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

---

1. The United States sued in the district court under 28 U.S.C. 1345 to recover the contract price and consequential damages from Franklin Steel Products, Inc., for breach of an express warranty that main aircraft engine bearings supplied by Franklin to the Navy conformed to contract specifications. The bearings Franklin supplied under its contracts with the Navy were counterfeits—"obsolete bearings which had been replated and renumbered so as to resemble the bearings called for in the contract" (Pet. App. 3). The obsolete bearings differed from the bearings specified in the contract in two important respects—the steel shell of the obsolete bearings was too soft, and there was insufficient tin content in a thin lead-tin overlay on the inside diameter of the bearing, the purpose of which was to lubricate the bearing while the engine warmed

up. In addition, the part number was misplaced on the bearings. The counterfeit nature of the bearings was not discovered until after 180 of them had been installed in engines being overhauled. Because of the danger of bearing failure, and consequent engine seizure, the Navy removed and replaced the counterfeit bearings, at a cost of over $147,000.

The district court entered judgment for the contractor on the ground that the misplaced part number should have been discovered on inspection by the government prior to acceptance of the bearings, and that the inspection clause of the contract superseded the warranty provision (Pet. App. B). The court of appeals reversed, noting that the warranty clause by its terms applies "notwithstanding inspection and acceptance" (Pet. App. A). The court of appeals further held that the inspection clause of the contract was inserted for the government's protection, and could not be relied upon by the contractor. See *United States* v. *Aerodex, Inc.*, 469 F. 2d 1003 (C.A. 5). The court awarded consequential damages, holding that the provision of the warranty clause limiting damages to the contract price was expressly inapplicable in the case of latent defects (Pet. App. 6).

2. The contract between petitioner and the government provided for inspection and testing by the government prior to acceptance (Pet. 4). However, the contract also provided that inspection and testing did not relieve the contractor (petitioner) of responsibility for failures to meet contract requirements discovered prior to acceptance and that acceptance would not be conclusive as regards latent defects (Pet. 5).

The court of appeals correctly held that the hardness and tin content defects were latent defects. It is

undisputed that these defects were not discoverable by visual inspection. Moreover, the tests called for by the contract would not have detected these defects (Pet. App. 5).[1] While tests exist which would have detected the defects,[2] these tests were not specified in the contract, and as a result, "[t]he government had every right to rely on Franklin's express warranty that the bearings would conform to the specifications" (Pet. App. 5, n. 4).

Petitioner's contention that the court of appeals adopted an erroneous definition of "latent defect" is without merit. Indeed, the court of appeals' decision is consistent with petitioner's suggestion that a latent defect is one "not discoverable upon reasonable inspection" (Pet. 11).[3]

The court of appeals correctly rejected petitioner's argument that Navy Procurement Directive 7-105.51(b)

---

[1]The contract specified only certain tests by providing that "[i]nspection shall include magna flux or zyglo or the equivalent thereof * * *" (Pet. 4). These tests were not designed to detect either hardness or tin content of bearings and thus would not have revealed the defects in this case.

[2]Petitioner contends that the so-called "Rockwell Hardness Test" would have disclosed the softness defect. However, in *Aerodex, supra,* which also involved counterfeit bearings, the court of appeals noted that since hardness of steel is controlled at the manufacturing level, and does not vary in bearings of a given part number, the test would be used only if counterfeiting were suspected. 469 F. 2d at 1010.

[3]Petitioner contends that the government had an obligation to conduct tests designed to disclose the defects in question even though the contract specified only certain tests. While the contract could have been written in accord with petitioner's claim, it was not and the court of appeals correctly refused to rewrite it.

invalidates the seller's express warranty of conformity to specifications. That directive provided that "[w]hen inspection and acceptance tests will afford full protection to the Government in ascertaining conformance to specifications * * * no guaranty provision for that purpose shall be included in the contract * * *." The court of appeals properly held the above-quoted regulation inapplicable (Pet. App. 5, n. 5). The inspection and tests called for by the contract were not designed to afford, and did not afford, the government full protection from latent defects in the bearings.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JANUARY 1974.

DOJ-1974-01